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In The

Supreme Court of the United States

October Term, 1998

TYRONE BROOKS, et al.,

Petitioners,

vs.

ROY BARNES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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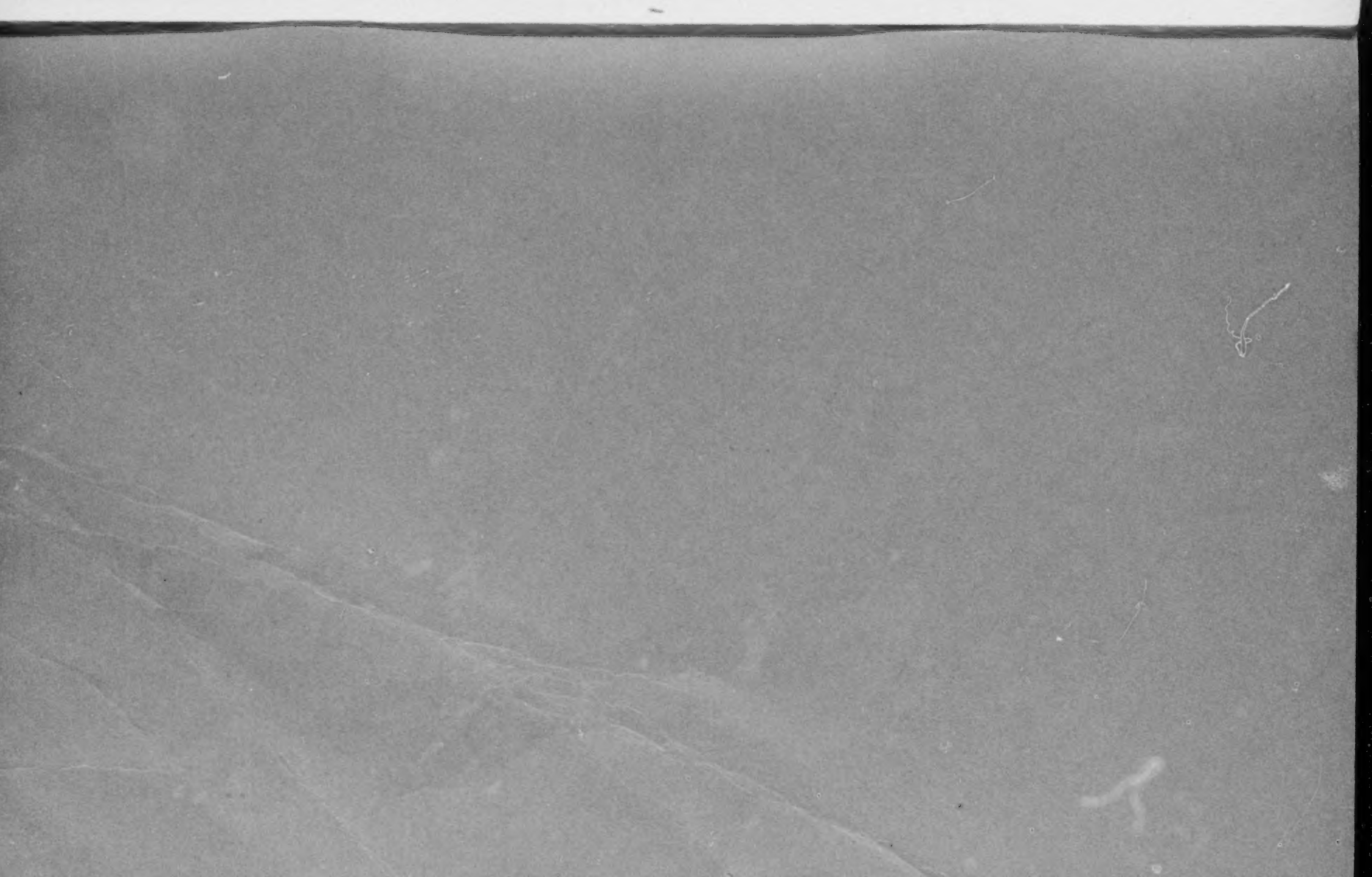

TABLE OF CONTENTS

Page

Statement of Material Facts 1

A. The Enactment Of The 1964 Code 1

B. Plaintiffs' Evidence On The Issue Of Intent 2

C. The Impact Of The Majority Vote Law 7

ARGUMENT 11

I. THE LOWER COURTS PROPERLY CONCLUDED THAT GEORGIA'S MAJORITY VOTE RULE DOES NOT RESULT IN DISCRIMINATION IN VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT 11

A. The Impact Of Georgia's Majority Vote Law Cannot Be Characterized As Having A Meaningful Racial Impact 11

1. Plaintiffs' Evidence Does Not Satisfy The Basic Preconditions To Prevail In A Section 2 Case 11

2. As A Matter Of Fact, The Actual Impact Of Majority Voting In Georgia Is Not Discriminatory 12

3. Plaintiffs' "Discouragement" Contention Is Without Merit Both Factually And Legally 14

B. The Absence Of Any Legally Cognizable Benchmark Forecloses A Section 2 Challenge 15

TABLE OF CONTENTS – Continued

Page

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT GEORGIA'S MAJORITY VOTE LAW WAS CONSTITUTIONAL 15

A. The Legal Elements Required To Prove Purposeful Discrimination 15

B. The District Court Properly Concluded That Georgia's Majority Vote Law Was Not Adopted For The Purpose Of Discriminating 16

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES:

Georgia v. Reno, 881 F.Supp. 7 (D.D.C.1995) 4

Holder v. Hall, 512 U.S. 874 (1994) 15

Hunter v. Underwood, 471 U.S. 222 (1985) 16

Mount Healthy School District v. Doyle, 429 U.S. 274 (1977) 16

Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994) (en banc), cert. denied, 514 U.S. 1083 (1995) 12

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 16

Thornburg v. Gingles, 478 U.S. 30 (1986) 11, 12

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 20, 21

STATUTES:

Voting Rights Act (Section 2), 42 U.S.C. § 1973 ....*passim*

STATEMENT OF MATERIAL FACTS

A. *The Enactment Of The 1964 Code.* The election code at issue here came about as a result of the efforts of Gov. Carl Sanders. Election law reform was a centerpiece of his gubernatorial campaign, and was one of two issues that led him to call the General Assembly into special session in 1964. Sanders appointed an Election Law Study Committee – which was separate and distinct from the ones appointed by prior governors – to draft a code and propose it to the General Assembly. One of the members of that Committee, Melba Williams, testified that majority voting was included in the proposed code without regard to any racial purpose. There was no testimony that her reasons might have been racial. (Pet. App. 41 n.6)

The purpose behind a legislative enactment necessarily focuses on the motives of *those persons who caused the enactment at issue to become law.* Here, the evidence is that the election code – and the majority vote provision specifically – were the product of the Sanders administration. There is abundant evidence that the majority vote law was passed by these key actors for beneficial, non-racial reasons. As Gov. Sanders testified, he supported majority voting in 1964 because

> I had seen too many instances where people went into office with a few votes on a plurality that I didn't really feel that that was the choice of the people. That just happened to be the results that came out because they had so many people they had gotten into a race and had sort of divided up the election results.

. . . .

> I think the public was ill-served by not having a candidate with a majority of the people – unless they had a candidate with the majority of the people supporting them. I think, otherwise, it was a disservice to the voter. That was my opinion. (P.I.T. Vol. V, 183-84)[1]

Like most people of the era, Gov. Sanders assumed that "majority rule" was a basic principle of American politics. He had seen people elected in Georgia under the old system with as little as 30% of the vote. That experience left him thoroughly disenchanted with plurality voting. (Id. 181) Gov. Sanders testified about other reasons for supporting majority voting which had nothing to do with race. He never heard anyone suggest "that plurality voting would be better for black candidates." (Id. 188) On cross-examination, plaintiffs' counsel declined to challenge Gov. Sanders on a single one of the reasons he gave for favoring majority voting. (Id. 199-231)

Testimony explaining similar non-racial reasons for supporting majority voting was given by other surviving witnesses who were involved in passing the election code and the majority vote provision. These witnesses included Milton Carlton, who was the President Pro Tem of the Senate in 1964, and the Speaker of the House from 1964, George T. Smith. (Id. 76-78, 80-83)

B. ***Plaintiffs' Evidence On The Issue Of Intent.*** The plaintiffs' intent case was based on the testimony of two

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[1] The separate transcript of the one-week preliminary injunction hearing held in 1990 will be cited as "P.I.T. Vol. ___."

history professors, Morgan Kousser and Steven Lawson. They, in turn, relied on their interpretations of various newspaper articles. The testimony of both professors revealed a singular lack of objectivity. Evidence that was inconsistent with the plaintiffs' thesis was uniformly ignored. Professor Lawson, for example, purported to rely on an unrecorded interview with ex-State Senator Leroy Johnson to support Lawson's opinion. But Lawson admittedly ignored sworn testimony by Johnson which contravened his opinion. (R. 14-154 to 155, 158-61, 177-78) Similarly, Lawson admittedly ignored the testimony of ex-House member James Mackay to the extent that it contradicted his opinion. (Id. 166-69) To the extent that Mackay's testimony could be used to substantiate Lawson's opinion, however, it was accepted without reservation. Id. Lawson also ignored volumes of sworn testimony by participants in the 1964 events that did not support the conclusion he wanted to come to. (Id. 150-51, 154-55, 158-59, 160-64, 172-73, 201-07)

The ultimate opinion offered by Professor Lawson still fell short of what is necessary for the plaintiffs to prevail. He had no opinion as to whether the majority vote law would have been adopted independent of race. (R. 14-240)

Petitioners contend that Gov. Sanders' support of majority voting was motivated by racial enmity. But plaintiffs' own non-expert witnesses – i.e., those persons who were actually involved in Georgia politics at the time, who personally knew Sanders, and who were then in the General Assembly – disagreed with that characterization. One of these two witnesses, James Mackay, testified that Sanders was the "most racially progressive

political figure in the South of any prominence back in those days." (Def. Ex. 880[2], Tab. 16 p. 541) The other witness, ex-Senator Leroy Johnson (a black member of the Georgia Senate), also admitted that Sanders' support of majority voting was not motivated by race. (Id. Tab. 14, p. 647) He testified to the same effect regarding Speaker George T. Smith. (Id. 641)

Plaintiffs also described the 1964 election code as "regressive" with regard to blacks' voting rights. The opposite was true. While the code did not eradicate all vestiges of Georgia's segregationist past, it was in no way a move backwards. Indeed, it is remarkable that petitioners attempt to paint such a bleak picture of the overall election code in light of the testimony of their own witness, Rep. Mackay. He testified that "the election code that was enacted in 1964 was a tremendously positive progressive reform for Georgia election laws." (Id. Tab 16, p. 548)

Plaintiffs relied largely on the supposed impact of one legislator, Denmark Groover. Their reliance was misplaced. While Groover got a majority vote bill passed in the House two sessions earlier (in the 1963 general session), that bill never became law. The majority vote provision that was actually enacted and that is at issue here, had completely distinct origins.

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[2] Defendants' Exhibit 880 are excerpts of testimony from witnesses in the trial of *Georgia v. Reno*, 881 F.Supp. 7 (D.D.C. 1995), where the Department of Justice unsuccessfully challenged Georgia's majority vote law.

Appellants ignore the uncontradicted testimony of the witnesses who actually participated in the enactment of this legislation, including Gov. Sanders himself. There is no evidence that Groover had any influence or impact in causing the Sanders administration to support the majority vote provision in the election code. As Gov. Sanders testified regarding Groover:

> A: He never discussed it [majority voting] with me, and he was not a part of my leadership. In fact, he was in the opposite camp and probably, you know, had no input into my administration. So I really don't recall Denmark Groover or anything that he might have said or done. I wasn't that interested in what Mr. Groover might have been saying or doing in that particular time.

> The Court: Even though he was not one of your chosen members, did he have political clout? People on the opposite side frequently do, and you have to do business with those people, don't you?

> A: Well, you do now a lot more than you did then. . . . But he had been Marvin Griffin's floor leader when I was elected to the House, and I was on the outside then, you know; I was not part of that administration. He very vigorously supported former Governor Griffin when I ran for governor.
>
> So, when I got elected and he was re-elected to the House, he had no influence, so far as I was concerned. And, fortunately, I had enough influence with the vast majority of the General Assembly to where, other than him being sort of a gadfly and picking at

> things and trying to spoil things, he was not influential at all. (P.I.T. Vol. IV, 188-89)

The Speaker of the House, George T. Smith, knew as well as anyone what influence Rep. Groover had during the Sanders administration. Smith testified as follows:

> Q. Now, while you were Speaker of the House and in 1963 and 1964, specifically, what was Denmark Groover's role and power in the House?
>
> A. He didn't have any power at all. He was, as you recall, Governor Marvin Griffin's floor leader for a couple of years, and he supported Governor Griffin very strongly. He had absolutely no influence. He was not a party to the Sanders team. He was not consulted. He was not invited into nor did he sit in any of the planning sessions. (P.I.T. Vol. V, 74)

The district court found, as it only could based on the evidence, that Groover's "ignoble" motives had nothing to do with the enactment of the provision at issue here:

> [Plaintiffs] claim that Denmark Groover's racial antipathy . . . must be imputed to the supporters of the 1964 law's majority vote requirement. However, Groover played no role in the Sanders administration, was not a member of the third ELSC, and had little or no influence upon the committee. Indeed, Groover was in the opposite camp by virtue of his support of Sanders' opponent in the gubernatorial race, Marvin Griffin. The court, therefore, will not attribute Groover's motives to the supporters of

> the 1964 law's majority requirement. (Pet. App. 42)
>
> . . . .
>
> It is clear, despite plaintiffs' attempts to tie Groover to the passage of the 1964 law, that Sanders and his allies were chiefly responsible for the new election code and that Groover had no input. (Id. 64)

The two ex-legislators who testified on behalf of the plaintiffs were of no assistance to them in this regard. While highly critical of Groover, Sen. Johnson was unaware of the legislative course of the 1964 Sanders election code reform bill. (Def. Ex. 880, Tab 14, p. 650) Even more significantly, Rep. Mackay *admitted that the election code that ultimately passed was not Groover's.* As Mackay testified, "I am willing to give one hundred percent to Governor Carl Sanders and his election law committee because they did a very thorough job." (Id. Tab 16, p. 557) He acknowledged Groover was not involved in that effort:

> [I]f you are trying to ex[o]rcise the memory of my colleague Denny Groover, I am willing for you to do it because I am willing to say that his hand was not in that election law commission's report. Id.

C. ***The Impact Of The Majority Vote Law.*** Comprehensive evidence was introduced regarding all runoff elections for primary, special and general elections in Georgia from 1970 to 1995. There were 2,773 such elections. Only some 10% of all of these runoff elections involved both a black and a white candidate. An even smaller percentage involved runoff elections in which the

race of the ultimate winner changed, as a result of a runoff, because the initial leader lost the runoff. Because any racial implications of the majority vote law are limited to the small fraction of those elections whose outcomes changed in a run-off, it can fairly be said – from this fact alone – that the racial impact of the law is slight. (Pet. App. 46-47)

Plaintiffs ignored this fact. They looked instead at only a handful of elections. But to concentrate on only a few of Georgia's nearly 3,000 runoff elections, does not fairly or objectively describe the overall impact of the law at issue here. Moreover, if one does focus just on the subset of runoff elections that involved cross-race elections, the racial implications of the runoff law are still insignificant. To assess the impact of the majority vote law in bi-racial runoffs, one must look at the *net* impact. That is determined by (1) taking the number of instances where initial black leaders subsequently lost a runoff to white candidates and (2) subtracting from that figure the opposite cases, i.e., those elections where a black candidate overcame, in a runoff, the white leader from the initial election. The difference between those two figures yields the ***net*** numerical difference in the number of candidates of either race who ultimately won.

For the years 1983-95, throughout the State, there was a total impact on black candidacies of "minus 14" for county-level offices. In other words, had the majority vote runoff not applied and a pure plurality rule been in place instead, there would have been a net of 14 more successful black nominations, out of the total of 1,045 runoffs that occurred for those offices (approximately 1.34%). (Def. Ex. 877 Table 3, p. 38; Def. Ex. 870) At the

same time, the majority vote runoff requirement had a net *positive* impact on black candidacies of "plus four" for legislative and superior court offices. Id. The racial impact for statewide and federal offices was a wash, with one black "positive flip" and one black "adverse flip" out of 41 runoffs from 1983 to 1995. Id.

In sum, there would have been a net increase of ten more black candidates nominated had the majority vote law been replaced by a pure plurality practice from 1983-95 for all county, state and federal offices throughout the entire State of Georgia. (Pet. App. 48) By any reckoning, that is an extremely small number compared to the number of offices actually elected, and the total of some 20,000 primary, special, and general elections during that time. It is also an extremely small number in comparison to the total number of runoffs, 1,197, during that same period.

The data reveals other conclusions. Among political scientists, the term "strong leader" refers to a candidate who soundly wins an election. A "strong leader" is one who garners at least 40% of the total vote and leads the next highest finisher by at least 5%. (Pet. App. 49) The data in Georgia shows that these "40 plus 5" strong leaders are particularly likely to win runoff elections. For the entire quarter of a century period, strong black leaders for county and local offices won 71% of their runoffs against white opponents. Id.

While the overall data does reveal some slight disparity in black and white leaders winning in cross-race runoffs, that difference is completely explained by the fact that more black leaders in the initial race were not

"strong leaders" compared to white leaders. Id. Regardless of race, leaders who won shared strong performance records in the initial election. They averaged over 40% in the initial election and they typically beat their nearest rival by ten to twelve percent. Id.

Black leaders who lost runoffs in Georgia were distinctly different. They had significantly lower vote percentages in the first primary, averaging 37.7%, and their margin over the second place finishers in the first election was only about half of that enjoyed by first election leaders who won runoffs. In other words, black leaders who lost were simply weaker candidates, on average, than black or white leaders who won runoffs. Id.

Defendants also did a jurisdiction by jurisdiction analysis of the runoff data. It showed that there were net losses for black candidates in only about 20% of Georgia's counties (32 out of 159) over the quarter of a century 1970-95. In 80% of Georgia's 159 counties, there were no net losses of nominations (much less elections) or there were actually *net gains* by black candidates seeking these county offices. Only 2 of 159 counties experienced as many as 3 net losses; 8 counties had 2 net losses; and 22 experienced a single loss. (Pet. App. 49) The more recent data shows even less of an impact. From 1980 to 1995, the vast majority of counties show either (1) no negative "net impact" or (2) a positive "net impact" on black candidacies as a result of the majority vote requirement. (Def. Ex. 852).

ARGUMENT

I. THE LOWER COURTS PROPERLY CONCLUDED THAT GEORGIA'S MAJORITY VOTE RULE DOES NOT RESULT IN DISCRIMINATION IN VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT.

A. The Impact Of Georgia's Majority Vote Law Cannot Be Characterized As Having A Meaningful Racial Impact.

1. Plaintiffs' Evidence Does Not Satisfy The Basic Preconditions To Prevail In A Section 2 Case.

The high water mark for challenging electoral practices under Section 2 occurred in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Justice Brennan's plurality opinion set forth several prerequisites to proving a Section 2 claim, one being that the challenged statute caused candidates supported by minority voters to be "usually defeated." Plaintiffs' proof failed this test. First, they focused almost exclusively on *nominations*, but nomination is not election. To be elected to the offices that plaintiffs challenge (with the exception of Georgia's nonpartisan judgeships), one must prevail in a partisan general election. There, one must normally win a majority of the votes by virtue of the two party system, or at the very least, win a 45% vote[3] to prevail under the *unchallenged* general election statute.

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[3] Petitioners assert that Georgia's 1994 reduction of the 50% majority to a 45% requirement for most general elections was done just to improve the political chances of Democrats. (Pet. pp. 2-3) In fact, the evidence is that that law arose because Libertarian candidates have often run for statewide offices in Georgia and garnered 2 or 3% of the vote, sometimes prompting statewide runoffs for one or two offices. The General Assembly enacted a 45% requirement for those general elections because of that problem.

Secondly, runoffs caused by Georgia's majority vote law occur in only a fraction of all elections in the State. Thus, even if there were a significant racial impact caused by the majority vote law itself, the statute would still not be causing the "usual defeat" of black candidates. In most elections, winners achieve 50% in the initial election. *Most blacks holding office throughout the State, as well as most whites, have won their positions by winning over 50% of the vote in the initial election.* Because of these facts alone, plaintiffs cannot cross the *Gingles* "usually defeated" threshold.

Finally, even if black candidates were faring poorly in runoffs, that would still be only one piece of the evidence that plaintiffs would have to prove. As Section 2 was explained in *Gingles*, plaintiffs would also have the burden of showing that specific races in the specific jurisdictions were lost because of racially polarized voting. Other factors would also have to be taken into account for the plaintiffs to prove that race was the actual *cause* of the defeat of the minority voters' choices. See, e.g., *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (*en banc*), cert. denied, 514 U.S. 1083 (1995). Plaintiffs did not come close to meeting this burden.

2. As A Matter Of Fact, The Actual Impact Of Majority Voting In Georgia Is Not Discriminatory.

Assuming plaintiffs can state a Section 2 claim, the evidence fell far short of showing that Georgia's law "results" in discrimination. The evidence revealed the following:

1. In the overall context of all Georgia elections, the racial impact of majority voting is nil.

2. In the small percentage of elections that resulted in bi-racial runoffs, the runoff had no effect in the great majority of cases.

3. While there are a handful more instances where black frontrunners have lost a runoff to white opponents than there are the opposite, that difference is close to nil.

4. In the context of all runoff elections, the racial impact can best be described as a wash.

5. What little net difference there has been between blacks losing bi-racial runoffs (after initially coming in first with a plurality) and the opposite, the effect is even less nowadays than it was in the past.

The evidence provided an ample basis for the district court's findings:

> [T]he court finds that plaintiffs have failed to present evidence of significant, adverse effects flowing to black voters and candidates from the majority vote law. Whether viewed in terms of absolute numbers (a net loss of 27 black candidates out of 41,000 elections over 25 years) or in terms of percentages (no negative impact in 98.5% of all runoffs), the racial impact of the majority vote requirement is, at most, negligible. (Pet. App. 53)

3. Plaintiffs' "Discouragement" Contention Is Without Merit Both Factually And Legally.

Petitioners contend that the majority vote requirement has "deterred" black candidates from seeking office. (Pet. 11-12, 20) The sole evidence plaintiffs offered to prove this allegation was vague testimony by several witnesses to the effect that some persons may have been "deterred" from running on account of the majority vote law. The trial court found the evidence unconvincing. For example, ex-Atlanta Mayor Maynard Jackson waxed on, as the court found, about how he had

> spoken to literally "thousands" of such potential black candidates over the course of his political career. On cross-examination, however, Mr. Jackson was unable to recall the name of even one such individual who has been deterred from running in the last five years. (Pet. App. 45)

At best, as the district court noted, the evidence adduced by plaintiffs

> minimally supports the notion that black candidates have taken the prospect of a runoff into consideration before entering the political arena. This is not proof, however, that the majority vote law improperly impacts potential black candidates. . . . Moreover, the evidence does not explain how the law is a more significant deterrent for black candidates than for white candidates who also must garner a majority of votes to win. (Id. 46)

B. The Absence Of Any Legally Cognizable Benchmark Forecloses A Section 2 Challenge.

Respondents contend that Section 2 does not allow a challenge to majority voting because there is no appropriate "benchmark" by which majority voting should be assessed. *Holder v. Hall*, 512 U.S. 874 (1994), rejected a voting challenge to the one-person county commission in Bleckley County, Georgia. A majority of the Court agreed that a Section 2 challenge could not be asserted because of the wide range of possible alternative benchmarks (i.e., possible sizes for the governing county commission). The same problem exists here. What are the "results" of Georgia's majority vote law to be judged against? While plaintiffs assume that a pure plurality system is the benchmark alternative, that is merely one of many possibilities. Another possibility would be 45%, as reflected in Georgia's current policy choice for general elections. There could also be a threshold minimum of 40%, 39%, 35%, or anything else. The pure plurality practice plaintiffs favor would mean that a candidate could prevail with one percent of the votes, so long as he or she was the top vote getter. By no means is that the obvious benchmark for a Section 2 assessment of Georgia's majority vote law.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT GEORGIA'S MAJORITY VOTE LAW WAS CONSTITUTIONAL.

A. The Legal Elements Required To Prove Purposeful Discrimination.

To make out a prima facie case of purposeful discrimination, plaintiffs must prove that the statute was enacted

"because of" a discriminatory purpose and that it would not have been enacted "but for" such a purpose.

> "Discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker, in this case the State legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

Even where plaintiffs prove that discrimination had been a "substantial motivating factor" in the adoption of a statute, there still is not illegal discrimination if the State would have adopted the statute regardless. *See Mount Healthy School District v. Doyle*, 429 U.S. 274 (1977). In *Hunter v. Underwood*, 471 U.S. 222 (1985), the Court held that the *Mount Healthy* analysis applies in determining whether voting statutes are unconstitutional because of a discriminatory purpose.

B. The District Court Properly Concluded That Georgia's Majority Vote Law Was Not Adopted For The Purpose Of Discriminating.

The district court gave a painstaking evaluation of the historical evidence. While plaintiffs may not like the results, by no stretch of the imagination are the court's findings clearly erroneous. More than ample evidence supports both the specific findings of the court and its ultimate conclusions. Some of the court's findings are as follows:

> Prior to the passage of the 1964 law, the state of elections and election laws in Georgia was chaotic. Georgia's election laws were marked by corruption and manipulation, and there were few laws to check such practices. Throughout the state, and in rural counties in particular, local elections were controlled by groups referred to as "courthouse crowds" which consisted of various office holders and politicos at the county courthouses. . . . [Election] rules – including the majority/plurality vote rules – varied from county to county and from election to election.
>
> The courthouse crowds sometimes manipulated elections by using plurality voting to retain their power. For example, spurious candidates called "stalking horses" were entered into local races to split the opposition vote and assure victory to candidates from the courthouse crowds – even though those candidates may have been opposed by a majority of the voters. (Pet. App. 35-36)

The court then went on to discuss the election law study committees which petitioners would put much stock in. Contrary to their contention that the district court ignored all of their evidence, these matters were discussed in detail. In addition, the evidence made it clear that the ELSC formed under Gov. Sanders was a complete break from the past. Petitioners' reliance on racial evidence from the earlier ELSCs in the 1950s (when far different governors were appointing the members of the committees) is simply an effort to cite inflammatory evidence that does not address *why the 1964 law was passed.*

In truth, the appellants' heavy reliance on the records of the ELSCs should be fatal to their claim. As is apparent from the archived records of these committees, no effort was ever made to "purge" the records of any of the State's racial past. A number of documents from the records of the prior ELSCs reveal explicit concerns based on race. If anyone wanted to determine what recommendations of those committees were racially motivated, it would be easy to do so.

Similarly, the records of the Sanders-appointed ELSC contain racially explicit documents. Racially explicit citizen input, for example, is there for all to read as to several issues. The totality of this evidence, however, speaks volumes by virtue of the absence of anything indicating that race played a role in the inclusion of the majority vote provision in the 1964 code. Every single document in the complete, unexpurgated records of the 1963-64 election law study committee are contained in defendants' exhibits 125-243. (R. 9-152-1 [fact stips.]) Not one of these hundreds of pages links race to majority voting.

In light of the picture petitioners try to paint, the absence of a single shred of such evidence in these records is a powerful contradiction of their whole theory. Given that there is a clear historical trail of racial purpose concerning some issues, the *absence* of any suggestion of a racial purpose in the 1964 ELSC's majority vote proposal strongly suggests that there was no such purpose.

Judge Freeman thoroughly discussed the evidence in this case, and he made the following findings on the

purpose issue. They abundantly support his conclusions of law:

> Many of the key backers of the 1964 law's majority vote requirement had "good government" motivations. They wanted to eliminate the use of stalking horse and dummy candidates and to loosen the courthouse crowds' grip on political power. One of those backers was Governor Sanders, who focused on election law reform in his 1962 gubernatorial campaign, appointed the third ELSC, and avidly supported majority voting. . . . [House Speaker] Smith also supported a majority vote rule, both for good-government and for personal reasons. Smith wanted to run for lieutenant governor in 1966 against incumbent Peter Zack Geer but feared he could not beat Geer under the plurality system.
>
> Plaintiffs make several arguments in support of their thesis that the 1964 law's majority vote requirement was racially motivated. First, they claim that Denmark Groover's racial antipathy, the basis for his 1963 majority vote bill, must be imputed to the supporters of the 1964 law's majority vote requirement. However, Groover played no role in the Sanders administration, was not a member of the third ELSC, and had little or no influence upon the committee. Indeed, Groover was in the opposite camp by virtue of his support of Sanders' opponent in the gubernatorial race, Marvin Griffin. The court, therefore, will not attribute Groover's racist motives to the supporters of the 1964 law's majority requirement. (Pet. App. 41-42)

. . . .

> Assuming that plaintiffs have proven that the challenged law was enacted for race-conscious reasons, defendants have shown that it would have been enacted even in the absence of those reasons. It is clear that Sanders and other supporters of the majority vote requirement had ample "good government" reasons for advocating the measure. They wanted to standardize elections in Georgia and to eliminate the chicanery that characterized plurality voting under the reign of the courthouse crowds. Indeed, Sanders himself narrowly avoided being the victim of such chicanery in the 1962 race for lieutenant governor. It is also clear, despite plaintiffs' attempts to tie Groover to the passage of the 1964 law, that Sanders and his allies were chiefly responsible for the new election code and that Groover had no input. . . . In short, the court finds the 1964 law's majority vote requirement would have been enacted for good government reasons, had race played no role in the matter whatsoever. Thus, plaintiffs have failed to prove that the measure was enacted with an overriding discriminatory purpose, and their constitutional claims must fail. (Id. 64-65)

Petitioners' contention that the lower courts "misapplied" *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), is misplaced. They wrongly assume that *Arlington Heights* set down some kind of procrustean rules that the district court ran afoul of. In fact, *Arlington Heights* simply gave some suggestions about the kinds of evidence that might be used in determining purpose in Fourteenth Amendment cases. But the ultimate finding of a court is governed by the

same rules of evidence and the same practical reasoning that control in any case, whether the issue of intent be in a constitutional case, a securities fraud case, a criminal case, or any of the hundreds of other contexts in which purpose and motive are at issue. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights, supra* at 266. That is exactly what the district court here did.

CONCLUSION

For the foregoing reasons and the reasons set forth in the lower courts' opinions, respondents respectfully request that the petition for certiorari be denied.

Respectfully submitted,

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